

9 FAM 42.32(a) Notes Employment-based First Preference Immigrants

9 FAM 42.32(a) N1 Defining “Priority Workers”

(TL:VISA-54; 2-28-92)

a. The statute designates the following aliens as “priority workers” who may be entitled to status as employment-based first preference applicants:

(1) Aliens with extraordinary ability [see 9 FAM 42.32(a) N1.1 below];

(2) Outstanding professors and researchers [see 9 FAM 42.32(a) N1.2 below]; and

(3) Certain multinational executives and managers [see 9 FAM 42.32(a) N1.3 below].

b. The Immigration and Naturalization Service must approve petitions in all of the above categories. [See 9 FAM 42.32(a) N2 below.]

9 FAM 42.32(a) N1.1 Aliens With Extraordinary Ability

(TL:VISA-54; 2-28-92)

To be considered as an alien with extraordinary ability, the alien must have sustained national or international acclaim. The alien’s accomplishments in the field of science, art, education, business or athletics must be recognized in the form of extensive documentation. The alien must be seeking to enter the United States to continue work in the field, and the entry of such alien must substantially benefit prospectively the United States.

9 FAM 42.32(a) N1.1-1 Defining “Extraordinary Ability”

(TL:VISA-54; 2-28-92)

8 CFR section 204.5(h)(2) defines “extraordinary ability” as follows:

“Extraordinary ability means a level of expertise indicating that the individual is one of that small percentage who have risen to the top of the field of endeavor.”

9 FAM 42.32(a) N1.1-2 Evidence of Extraordinary Ability

(TL:VISA-54; 2-28-92)

a. The Immigration and Naturalization Service regulations (8 CFR 204.5(h)(3)) state the documentary evidence that is to be submitted along with the petition. Such evidence shall include:

(1) Evidence of a one-time achievement (that is a major, internationally recognized award) or

(2) At least three of the following:

(a) Evidence of receipt of a lesser nationally or internationally recognized prize or award for excellence in the field of endeavor;

(b) Evidence of membership in associations which require outstanding achievements of their members, as judged by recognized experts;

(c) Published material in professional or major trade publications or major media about the alien's work;

(d) Evidence of participation on a panel, or individually, as a judge of the work of others in the field;

(e) Evidence of original scientific, scholarly, artistic, or business-related contributions of major significance;

(f) Evidence of authorship of scholarly articles in professional journals or other major media;

(g) Evidence of the display of the alien's work in exhibitions or showcases;

(h) Evidence that the alien has performed in a leading or critical role for organizations or establishments having a distinguished reputation; and

(i) Evidence of high salary or high remuneration in relation to others in the field; or

(j) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk or video sales.

b. If the above standards do not readily apply, the petitioner may submit comparable evidence to establish eligibility.

9 FAM 42.32(a) N1.1-3 Labor Certification/Job Offer

(TL:VISA-54; 2-28-92)

Although no offer of employment (including a labor certification) is required, the alien must include with the petition convincing evidence that he or she is coming to continue work in the area of expertise. Evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments, such as contracts, or a statement from the beneficiary detailing plans for continuing work in the United States.

9 FAM 42.32(a) N1.2 Outstanding Professors and Researchers

(TL:VISA-54; 2-28-92)

An alien may qualify as a priority worker outstanding professor or researcher if the alien:

- (1) Is recognized internationally as outstanding in a specific academic area;
- (2) Has at least 3 years of experience in teaching or research in the academic area; and
- (3) Has the required offer of employment. [See 9 FAM 42.32(a) N1.2-3 below.]

9 FAM 42.32(a) N1.2-1 Evidence of Outstanding Achievement

(TL:VISA-54; 2-28-92)

The Immigration and Naturalization Service regulations (8 CFR 204.5(h)(3)) indicate the evidence required in submitting a petition for classification as an outstanding professor or researcher. Such evidence shall include evidence of international recognition as outstanding in the specific academic area. This evidence shall consist of at least two of the following:

- (1) Documentation of receipt of major international prizes or awards for outstanding achievement in the academic area;
- (2) Documentation of the alien's membership in associations in the academic field, which require outstanding achievements of their members;
- (3) Published material in professional publications written by others about the alien's work;
- (4) Evidence of participation on a panel, or individually, as the judge of the work of others in the same, or an allied, academic field;
- (5) Evidence of original scientific or scholarly research contributions; or

(6) Evidence of authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

9 FAM 42.32(a) N1.2-2 Labor Certification/Job Offer

(TL:VISA-54; 2-28-92)

Aliens coming to the United States as outstanding researchers or professors do not require labor certification. However, such aliens must have a letter from a(n):

(1) U. S. university or institution of higher learning offering the alien a tenured or tenure-track teaching or research position in the academic field; or

(2) Department, division, or institute of a private or non-profit employer offering the alien a comparable research position in the academic field. The department must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in the academic field.

9 FAM 42.32(a) N1.3 Certain Multinational Executives and Managers

(TL:VISA-54; 2-28-92)

An alien may qualify as a priority worker multinational executive or manager if:

(1) During the 3 year period preceding the time of the alien's application for classification and admission into the United States, the alien has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof; and

(2) The alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

9 FAM 42.32(a) N1.3-1 Defining "Affiliate"

(TL:VISA-54; 2-28-92)

The term "affiliate" as used in this section means:

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual.

(2) One of two legal entities entirely owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity; or

(3) In the case of a partnership that is organized in the United States to provide accounting services, along with managerial and/or consulting services, and markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the U.S. partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the U.S. partnership is also a member.

9 FAM 42.32(a) N1.3-2 Defining “Doing Business”

(TL:VISA-54; 2-28-92)

“Doing business” means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

9 FAM 42.32(a) N1.3-3 Defining “Executive Capacity”

(TL:VISA-54; 2-28-92)

The term “executive capacity” as defined in INA 101(a)(44)(B) of the Immigration and Nationality Act, means an assignment within an organization in which the employee primarily:

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

9 FAM 42.32(a) N1.3-4 Defining “Managerial Capacity”

(TL:VISA-54; 2-28-92)

a. “Managerial capacity” as defined in INA 101(a)(44)(A) means an assignment within an organization in which the employee primarily:

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(3) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organization hierarchy or with respect to the function managed; and

(4) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

b. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of supervisory responsibilities unless the employees supervised are professional.

9 FAM 42.32(a) N1.3-5 Defining “Multinational”

(TL:VISA-54; 2-28-92)

“Multinational” means that the qualifying entity, or its affiliate or subsidiary conducts business in two or more countries, one of which is the United States.

9 FAM 42.32(a) N1.3-6 Defining “Subsidiary”

(TL:VISA-54; 2-28-92)

“Subsidiary” is defined as a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

9 FAM 42.32(a) N1.3-6 Labor Certification/Job Offer

(TL:VISA-54; 2-28-92)

No labor certification is required for aliens in this classification. However, the prospective U.S. employer must furnish a job offer in the form of a statement which indicates that the alien will be employed in the United States in a managerial or executive capacity. The letter must clearly describe the duties to be performed.

9 FAM 42.32(a) N2 Petitions

(TL:VISA-54; 2-28-92)

Aliens of extraordinary ability may file petitions with the Immigration and Naturalization Service on their own behalf. Other employer-sponsored immigrants must be beneficiaries of approved petitions filed by the employer.

9 FAM 42.32(a) N3 Spouse and Children

(TL:VISA-54; 2-28-92)

The spouse, or the child of a marriage which existed at the time of the principal alien's admission into the United States, is entitled to derivative status and may accompany or follow to join the principal applicant. A spouse or child acquired subsequent to the principal alien's admission is not entitled to derivative status.